(1)

No. 04-213 19 DEC 6

In the
SUPREME COURT of the UNITED STATES

KAREN S. ZELMER,

Petitioner,

v.

JOANNE BARNHART,
COMMISSIONER OF THE SOCIAL SECURITY
ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Karen S. Zelmer, pro se
1777 East Poncho Trail
Sierra Vista, Arizona 85635
(520) 378-2567

56 pp

QUESTIONS PRESENTED:

The Ninth Circuit Court failed to properly review and address Petitioner's case. The questions presented are:

1. Did the U.S. Court of Appeals for the Ninth District ever address the main point posed by Petitioner? Is USPS financially on-budget for its operational costs, or are operational costs to include labor paid from the sale of postal services – postage and mailings?

2. Was the issue of failure to reasonably accommodate Petitioner's past administrative representative in the form of a change of venue for a certified qualified handicapped individual ever reasonably considered?

3. Did the ALJ commit an egregious error, when he admittedly asserted he allowed attorney representatives changes of venue regularly, but due to Petitioner's non-attorney status deny reasonable and timely change of venue request?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

When the Ninth Circuit U.S. Court of Appeals failed to address the issue of the United States Postal Service's ("USPS") budget status, it failed to reasonably and fully consider, *de novo* or otherwise, the issue brought by Petitioner. The issue remains: Is the Petitioner's disability pension from the USPS subject to the off-set provision, or due to the USPS's unique independent off-budget financial status, is it not properly subject to the offset provision.

STATEMENT OF JURISDICTION

The United States Court of Appeals Rule 10(a) states "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with ta decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." (emphasis added)

STATEMENT OF THE CASE

The only question the courts have addressed to-date, concerns the federal relationship the USPS retains, and all citations they offer only address that point. The off-set provision was enacted to prevent undue strain on the federal budget, to prevent "double-dipping," which would make the USPS's budgetary status cogent and germane to any other coherent adjudication of Petitioner's application for full widow's survivor's benefits. The attached letter from governmental relations representative Mr. Weagley, affirming Petitioner's position regarding the budget status of the USPS being independent, has been so far ignored. How can anyone in good conscience suggest this appeal has even been reasonably addressed or adjudicated?

Please be aware, this issue has not been raised in any decision offered by any of the courts. The courts site *Heckler v. Mathews, 465 US 728 (1984)* which is outdated and does not address the issue of the USPS being off budget. *Silver v. USPS, 951 F.2d 1033*, involves a company trying to escape sanctions brought against them. The USPS had certain governmental relationships "grand-fathered in" after the Reorganization Act which mandated the USPS to function independently and "break even" financially over the years. There remains governmental oversight, but the USPS is revenue self-generating. If revenue falls short, they raise their rates, as recently occurred.

The USPS competes directly against private enterprise, which the U.S. Constitution expressly prohibits. There was a case of *Fed Ex/UPS v. USPS*, wherein a District Court Judge ruled the USPS could not claim

governmental status/protection while functioning as private enterprise. It was settled confidentially and no court to-date has offered to use their access to obtain a copy.

Regarding the timely change of venue requests, the ALJ admitted allowing attorney representatives changes of venue, but ignored Petitioner's timely and repeated requests. When the representative of Petitioner's choice asserted his qualified handicapped status, he was denied and issued a not so veiled threat of compromising Petitioner's appeal if he kept insisting He was not provided an opportunity to submit proof of handicap status and Petitioner was forced to proceed to a hearing without assistance of her representative. The ALJ has the authority to decide the venue, but does he hold authority to unilaterally abrogate the Americans with Disabilities Act? Apparently so.

This is a larger issue than appears on the face of this appeal. That would be why the lower courts chose to circumvent the main issue presented by this appeal, budgetary status vice semantics of relationship to government. Petitioner wishes to receive her deceased U.S. Veteran husband's survivor's benefits without it being subject to the offset (which leaves his 66-yr old widow with a total of Nine dollars benefit).

REASONS FOR GRANTING WRIT and CONCLUSION

In summary, Petitioner begs this Court to see the common sense in her position and find in her favor for the following reasons. The record is replete with references to all herein claimed. Petitioner wishes to receive her

deceased husband's Social Security survivors benefit without deduction due to misapplied offset. Petitioner wishes to be made whole, that is to make this retroactive to her initial application. Petitioner wishes the SSA and ALJ to allow any representative and applicant be afforded the instructions and opportunity to provide any documentation ostensibly required for reasonable treatment and appropriate accommodation. The agencies had Petitioner's representative's social security number and could easily access his 100% disabled status from U.S. Veterans Affairs. If credit agencies can do this, it follows the SSA, ALJ, and courts, with full access to his file, could verify the same. If they had interest in being fair and reasonable, they could have instructed Petitioner or her representative to provide documentation. They probably knew his status, which is why they never requested proof. It is also sad that non-attorney representatives are accorded a lower standard of treatment than attorney representatives during attempts at administrative remedy. This Petitioner prays for your empowered assistance to right the wrongs, perusal of this entire record would clearly indicate.

Respectfully submitted this 3 day of March 2003.

Karen S. Zelmer

Karen S. Zelmer
Pro Se

CERTIFICATE OF SERVICE

I certify that I served the foregoing
Writ of Certiorari and enclosure by
by regular United States Mail on the
7 day of March 2003 on the following:

R. Linda Cosme
Assistant Regional Counsel
Social Security Administration
333 Market Street, Suite 1500
San Francisco, CA 94105

(Per Rule 29.4(a))

Solicitor General of the United States
Department of Justice, Rm 5614
950 Pennsylvania Avenue, N.W.
Washington DC 20530-0001

By Karen S. Zelmer

Karen S. Zelmer
1777 East Poncho Trail
Sierra Vista, AZ 85635
(520) 378-2567

ATTACHMENT

UNITED STATES
POSTAL SERVICE

September 22, 1998

Honorable Sam Farr
Member of Congress
701 Ocean Street, Room 318
Santa Cruz, CA 95060-4027

Dear Congressman Far:

This responds to your September 1 letter on behalf of Ms. Karen S. Zelmer of Moss Landing, regarding the Postal Service's status as an independent federal agency.

I understand your interest and appreciate the opportunity to provide some additional information about the Postal Service. The Postal Service is an independent government organization directed by an eleven-member Board of Governors. Nine of the members (the "Governors") are appointed by the President, with the advice and consent of the Senate, to nine-year terms or the unexpired portion of a term. The Governors

represent the public interest generally; no more than five may be adherents to the same political party. The Governors appoint the Postmaster General who, with the Governors, appoints the Deputy Postmaster General. These eleven persons comprise the full Board of Governors.

In August 1970, when Congress created the U. S. Postal Service as an independent establishment of the executive branch of the government, it retained jurisdiction for oversight of our operations. Each year, oversight hearings on the state of the Postal Service are conducted in both the House of Representatives and in the Senate. We are fully answerable to Congress in conformance with the Postal Reorganization Act.

I would also like to note that contrary to what many people believe, Postal Service operations are funded by

the users of the mail, not the taxpayers. Fiscal Year 1982 marked the last time the Postal Service received a public service subsidy. The appropriations we receive are for certain preferred classes of mail, which have been designated by law.

I hope this information clarifies the matter and will enable you to respond to her. Please let me know if I can be of assistance in other postal issues.

Sincerely,

/s/

William J. Weagley
Government Relations Representative

SOCIAL SECURITY ADMINISTRATION

Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Karen S. Zelmer (Claimant)	Abatement of Government Pension Offset Provisions; Widow's Insurance Benefits
Melvin Zelmer (Deceased Wage Earner)	(X-ref: 572-48-0996) 570-40-5724 D Social Security Number

The case is before the administrative law judge upon a request for hearing filed by the claimant, Karen Zelmer, who disagrees with the determination of the Social Security Administration which found that Ms. Zelmer was subject to the government pension offset provisions of section 202(e) (7) of the Social Security Act. Following notice to the claimant, a hearing was held on July 24, 1998, in Monterey, California, at which time

the claimant appeared and testified. Since the issue raised by the claimant was purely a matter of law, the claimant was not sworn. The claimant had been assisted in this matter by Rainer Thornhill, a non-attorney representative living in San Diego. The claimant's request for a change of venue was denied and this action was affirmed by the Regional Chief Administrative Law Judge, as reflected in his letter to Congressman Sam Farr. (Exhibit 18).

ISSUE

The particular issue is whether the claimant's widow's benefits are subject to the government pension offset (GPO) which is set forth in section 202 (e) (7) of the Act. A related issue is whether pensions paid by the United States Postal Service constitute government pensions within the purview of the statute.

APPLICABLE LAW AND REGULATIONS

Sections 202 (e) (7) of the Social Security Act was enacted as part of Public Law 96-215. Section 202(e) (7) provides:

> (A) The amount of a widow's insurance benefit for each month . . . Shall be reduced (but not below zero) by an amount equal to two-thirds of the amount of any monthly periodic benefit payable to the widow . . . for such month which is based upon her earnings while in the service of the Federal Government . . . [42 U.S.C. § 402 (e) (7) (A) (1988)]

DISCUSSION

The claimant is a 63 year old individual who applied for widow's benefits on the account of her deceased husband in December 1996. Mrs. Zelmer retired from the Post Office and receives a postal pension of approximately $925 per month. Under the government pension offset provisions of the Social Security Act, the claimant was advised by the Social Security Administration (SSA) that the social security widow's

pension of $615 would be reduced to $9.00 alleging that her pension is a "disability benefit and may not fit the criteria" of the widow's offset rule. In its reconsidered determination SSA advised the claimant that she was subject to the offset rule unless she met the very limited exceptions. (Exhibit 4). Based on the evidence in the record, it is apparent that Mrs. Zelmer does not meet the exceptions enumerated in section 404.408a of Regulations No. 4.

Mrs. Zelmer requested a hearing on October 28, 1997. In her hearing request she contends that the disability pension is not a "government pension of annuity." The claimant asserted that one "need only research back to the rationale proffered for the last [POSTAL] RATE INCREASED." (Exhibit 5). In a letter of July 20, 1998, the claimant's representative wrote that the

United States Postal Service (USPS) has not been a government agency since 1971, the year of the Postal Reorganization Act. Mr. Thornhill argues that "proof" of non-governmental status consists of the fact that the USPS sponsors a Tour de France bike team, that it does not receive direct U.S. government subsidies, and that it competes with "other private entities" such as Federal Express and UPS. Mr. Thornhill includes remarks to the effect that Mrs. Zelmer continues "to suffer because of lack of clarity and comprehension on the part of egregiously negative representatives of this Social Security Administration." (Exhibit 9).

Neither the claimant nor her representative offered any specific statutory or regulatory basis for the argument that the USPS is wholly independent of the U.S. government. In fact, the language of the U.S.

Constitution expressly contradicts the claimant's position, as does the U.S. Supreme Court decision in Heckler v. Mathews, 104 S.Ct. 1987 (1984). First, Article I, section 8, of the Constitution gives Congress the power to, among other things, "establish post offices and post roads." There have been no constitutional amendments depriving Congress of the power to oversee the postal system. There is, in fact, no basis in law for asserting that the USPS, notwithstanding its "independent" status, is no longer a government agency.

Second, in the Mathews case the U.S. Supreme Court addressed the appeal of a widower who challenged the government pension offset provisions as they applied to him. Mr. Mathews was, in fact, a retiree of the USPS. The Court discussed the fact that Congress adopted the offset requirement to prevent the serious fiscal drain that

it concluded would result from payment of unreduced benefits to both widows and widowers on top of other government pension offset provisions to Mr. Mathews. As the Court later stated in Sullivan v. Zebley, 493 U.S. 521 (1990), its review is limited to determining whether rules and regulations promulgated under the statute exceed the Secretary's [now Commissioner's] statutory authority. The court affirmed the well-established principle that if the Commissioner's regulations which implement the government pension offset rule are rational and consistent with the statute (as enacted by Congress), they cannot be disregarded.

Finally, the claimant and her representative are encouraged to consult to the 1997-1998 United States Government Manual (published by the Office of the Federal Register), which discusses the U.S. Postal

Service's status as "an independent establishment of the executive branch" of government (p. 706). The USPS is similar to numerous other independent U.S. government agencies; these include the Social Security Administration, the pension Benefit Guaranty Corporation, the FDIC, the Federal Trade Commission, the SEC, the Small Business Administration, myriad other alphabet agencies which undertake important government operations.

The undersigned also reviewed the Congressional Quarterly articles and the brief excerpt of certain Social Security regulations submitted by Mr. Thornhill. The articles, dating from 1993 and 1996, simply recite the fact that the Postal Service must fund from its revenues certain USPS fiscal obligations, including the funding of portions of USPS retirement costs.

In summary, the undersigned administrative law judge is persuaded that, with the exception of Mr. Thornhill, there is little dispute about the fact that the USPS continues to function as an integral part of the U.S. government, albeit in as an independent agency which generates its own revenue and manages its own fiscal operations. However, its existence and the allegiance which its board of governors subscribe to relate directly to its status under the U.S. Constitution.

In light of the facts outlined above, it is apparent that, like individuals receiving pensions from any of the dozens of independent Federal government agencies, the claimant receives a government pension based on her work for the USPS and that pension makes the Mrs. Zelmer subject to the government pension offset rules of the Social Security Act.

FINDINGS

After careful consideration of the entire record, the administrative law judge makes the following findings:

1. The claimant filed for widow's insurance benefits (social security) in December 1996.
2. The claimant receives a disability pension from the United States Postal Service.
3. As discussed in the body of this decision, the United States Postal Service is an independent agency of the U.S. government.
4. The claimant's Social Security widow's benefits are subject to the government pension offset (20 CFR 404.408a).

DECISION

It is the decision of the administrative law judge that the claimant's widow's insurance benefits were properly subject to the government pension offset provisions of the Social Security Act, as implemented through 20 CFR 404.408a.

/s/
H. Jarvis Turner
Administrative Law Judge

8/17/98
Date

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHBT2
570-40-5724

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

MAR 18, 2000

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Karen S. Zelmer
P.O. Box 836
Moss Landing, CA 95039

Dear Ms. Zelmer:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on August 17, 1998.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by

the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as

the final decision of the Commissioner of Social Security in your case.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General

of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

/s/

Pamela D. Crawford
Appeals Officer

cc:
Rainer M. Thornhill

FILED

SEP 4 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KAREN S. ZELMER, Plaintiff, v. KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, Defendant	NO. C 00-20554 RMW JUDGMENT AFFIRMING DECISION OF COMMISSION

On August 21, 2001 the court entered its order

affirming the decision of the Commissioner. Therefore,

IT IS HEREBY ORDERED pursuant to 42 U.S.C. § 405(g) that the decision of the Commissioner is affirmed and that judgment be entered in favor of the Commissioner and against plaintiff Karen Zelmer.

DATED: 8/21/01

/s/
RONALD M. WHYTE
United States District Judge

Copy of order mailed on SEP 4 2001 to:

Karen S. Zelmer
P.O. Box 836
Moss Landing, CA 95039
Plaintiff

Jocelyn Burton
U.S. Attorney's Office
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, CA 94102
Counsel for defendant

FILED

SEP 4 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KAREN S. ZELMER, Plaintiff, v. KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, Defendant	NO. C 00-20554 RMW ORDER GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT **[Re: Docket No. 5, 9]**

Plaintiff Karen Zelmer ("plaintiff") brings this action pursuant to section 205(g) of the Social Security

Act, as amended, 42 U.S.C. § 405(g), for judicial review of the decision of the Commissioner of Social Security ("defendant") offsetting her widow's benefits. On October 20, 2000, plaintiff moved for summary judgment. On January 22, 2001, defendant filed a cross-motion for summary judgment. On February 7, 2001, plaintiff filed a response to defendant's cross motion and the matter was submitted without oral argument pursuant to Civil Local Rule 16-5. The court has read the moving and responding papers.[1] For the reasons set forth below, the court denies plaintiff's motion for summary judgment and grants defendant's cross-motion for summary judgment.

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[1]The court has taken into consideration plaintiff's "Response to Answer," which plaintiff filed on December 20, 2000.

I. BACKGROUND

The Social Security Act provides spousal benefits for wives, husbands, widows, and widowers of retired and disabled wage earners. See 42 U.S.C. § 402; Heckler v. Matthews, 465 U.S. 728, 731 (1984). Widow's benefits are based upon the deceased spouse's wages and self-employment income. See 42 U.S.C. § 402(e)(1). In order to receive widow's benefits, the surviving spouse must be of retirement age, must be entitled to receive wife's insurance benefits on the basis of wages and self-employment income of the deceased spouse for the month preceding the month in which the spouse died, and must remain unmarried. See id. Concerned that individuals who received both their own government pensions and widow's benefits would

financially drain the Social Security funds, Congress imposed an offset provision to the widow's benefits in 1977. See Heckler, 465 U.S. at 732. Under the initial offset provision, widow's benefits were "offset by the full amount of any pension the [widow] received as a result of employment not covered by social security, from a federal, state, or local government agency." Batista v. Sullivan, 882 F.2d 1480, 1482 (9th Cir. 1989); Pub.L.No. 95-216, §§ 334 (c)(1)(d)(1), 91 Stat. 1545; 20 C.F.R. § 404.408a. However, in 1983, Congress amended the offset provision to provide that, for those who became eligible to receive government pensions after June 30, 1983, only two-thirds of that government pension would offset widow's benefits. See Batista, 882 F.2d at 1482; 42 U.S.C. §§ 402(e)(7).

In December 1996, plaintiff applied for widow's benefits under Title II and Part A of Title XVIII of the Social Security Act. Tr. 47. The Social Security Administration ("SSA") found that plaintiff was eligible for monthly widow's benefits of $615.00. Tr. 55. However, since plaintiff received approximately $909.00 each month as pension benefits from the U.S. Postal Service ("USPS"), the SSA reduced plaintiff's widow's benefits by two-thirds of her USPS pension pursuant to 42 U.S.C. section 402(e)(7) and 20 C.F.R. section 404.408a. Id. Therefore, plaintiff was awarded only $9.00 per month in widow's benefits. Id.

On March 3, 1997, plaintiff appealed the offset reduction by filing an SSA Request for Reconsideration. Tr. 14, 50. In the reconsideration request, plaintiff

alleged that her USPS pension was a "disability benefit, and may not fit the criteria" for an offset provision under 20 C.F.R. section 404.408a. Id. On September 13, 1997, the SSA sent plaintiff a Notice of Reconsideration informing her that her widow's benefits were subject to the offset provision because she became eligible to receive her USPS pension after July 1, 1983. Tr. 54-56.

On October 28, 1997, plaintiff requested a hearing before an SSA Administrative Judge ("ALJ"). Tr. 58. In her request for a hearing, plaintiff contended that the SSA erred in concluding that her USPS pension is a "government pension or annuity." Tr. 14, 58. After the hearing, on August 17, 1998, the ALJ determined that plaintiff's USPS pension subjects plaintiff's

widow's benefits to an offset pursuant to 20 C.F.R. section 404.408a. Tr. 16. In addition, the ALJ found that: (1) plaintiff filed for her widow's benefits in December 1996; (2) plaintiff receives a disability pension from the USPS and (3) the USPS is an independent agency of the U.S. government. Id. On March 18, 2000, the ALJ's decision became final when the SSA Appeals Council declined to review the ALJ's decision. Tr. 4. Plaintiff filed this action on May 18, 2000.

II. STANDARD

When the denial of Social Security benefits is reviewed by the district court, "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."

42 U.S.C. § 405(g). Substantial evidence is "more than a scintilla but less than a preponderance." Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). Judicial review of the Commissioner's decision is based on the records as a whole, looking at evidence that both supports and detracts from his or her decision. See id. Even if the record could support more than one reasonable conclusion, the court may not substitute its interpretation for that of the Commissioner, as long as his or her findings are supported by substantial evidence. See Verduzco v. Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999). In doing so, the court must ensure that the ALJ applied the correct legal standards. See Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998).

III. ANALYSIS

In plaintiff's motion and "Response to Answer," plaintiff argues that (1) the SSA procedurally erred in its review of her case; (2) the ALJ identified the wrong issue in analyzing whether her USPS pension offsets her widow's benefits and (3) the SSA did not give fair and reasonable consideration to the evidence that plaintiff submitted.

A. Procedural Error

Plaintiff argues first that there was "clear procedural error/defect" on the part of the SSA because she "has been ignored, prevaricated to, and bureaucratically abused." Motion for Summary Judgment at 1:27, 2:3-4. Plaintiff also asserts that the SSA has "repeatedly obstructed [her] right to administrative review and subsequent remedy," has

"obstructed congressional inquiry on behalf of [plaintiff]," has "fail[ed] to proceed on a timely basis and [has failed] to assist the U.S. Attorneys with imperative logistical assistance." Id. At 3:5-6, 10-11, 26-28. Plaintiff, however, fails to identify or provide any evidence of this alleged mistreatment, and plaintiff's allegations cannot alone support a reversal or remand.

B. Identifying the Issue

Plaintiff next contends that the ALJ did not correctly identify the main issue presented in her request for full widow's benefits. Although plaintiff's argument is not entirely clear, it appears that plaintiff is addressing the ALJ's finding that the USPS is part of the federal government and that plaintiff's widow's benefits were

properly offset by her USPS pension. See Tr. 16. According to plaintiff, the USPS is "off budget," meaning, apparently, that the USPS' budget is somehow separate from the federal government's overall budget. See Plaintiff's Response to Answer at 2:24; Tr. 2:2-4; Tr. 133, 138, 174. Plaintiff contends that due to this separate budget status, she should be able to collect the full amount of her USPS pension and widow's benefits. Plaintiff's Response to Answer at 2:2-7; Tr. 138. Plaintiff argues that the "crux of this case" is therefore whether the USPS is "on budget" or "off budget." Plaintiff's Response to Notice and Memorandum ("Plaintiff's Response") at 1:26-29. However, 20 C.F.R. section 404.408a(a) and 42 U.S.C. section 402(e)(7)(A) do not provide any exceptions to the offset

provision based upon the USPS' budget status.

Specifically, 20 C.F.R. section 404.408(a) expressly states that

> [u]nless you meet one of the exceptions . . . your Social Security benefits as wife, husband, widow, widower,. . . will be reduced each month you are receiving a *monthly pension from a Federal, State, or local government agency (government pension)* for which you were employed in work not covered by Social Security on the last day of such employment. Your monthly Social Security benefit as a spouse *will always* be *reduced because of your Government pension. . . .*

(emphasis added); see also Heckler, 465 U.S. at 732. In addition, 42 U.S.C. section 402(e)(7)(A) expressly states that

> [t]he amount of a widow's insurance benefit for each month . . .shall be reduced (but not below zero) by an amount equal to two-thirds of the amount of any monthly periodic benefit payable to the widow (or surviving divorced

> wife) for such month *which is based upon her earnings while in the service of the Federal Government or any State. . . .*

(emphasis added). The ALJ therefore properly noted that an issue in the case was "whether pensions paid by the [USPS] constitute government pensions." Tr. 13.

C. Plaintiff's Evidence

Plaintiff argues that "no one has . . . given fair and reasonable consideration to the facts plaintiff has submitted" to show that the USPS' budget is separate from the federal budget. Plaintiff's Response at 2:21-23. Specifically, plaintiff refers to the excerpts she submitted from the Congressional Quarterly pertaining to President Clinton's proposals for changes to the USPS retirement system as well as excerpts from 5 U.S.C. section 8348 pertaining to the USPS' funding.

See Tr. 15, 173-176. The Congressional Quarterly excerpts, however, only describe presidential budget proposals, not any effective authority. Moreover, section 8348 supports the ALJ's conclusion that the USPS "must fund from its revenue certain USPS fiscal obligations, including the funding of portions of USPS retirement costs." Tr. 15; see also Tr. 173-177. For example, section 8348 (m)(l) states that the USPS "shall be liable for that portion of any estimated increase in the unfunded liability of the Fund which is attributable to any benefits payable from the Fund to former employees of the Postal Service . . ." Tr. 175. The fact that the USPS funds its employees' retirements from its own budget does not establish that the USPS is not part of the federal government and plaintiff's widow's benefits

are thus not subject to an offset.

Plaintiff also contends that the SSA ignored a September 22, 1998 letter she submitted from USPS Government Relations Representative Weagley to Congressman Sam Farr. Plaintiff's Response at 3:12-13; see also Tr. 217. The September 22, 1988 letter states that the USPS' "operations are funded by the users of the mail, not the taxpayers . . . [and] fiscal year 1982 marked the last time the [USPS] received a public service subsidy." Tr. 217. The letter also states, however, that the USPS "is an independent *government organization* directed by an independent establishment of the *executive branch of the government*. . ." Id. (emphasis added). Therefore, the letter supports the ALJ's finding that "the [USPS] is an independent

agency of the U.S. government" and that plaintiff's widow's benefits are thus subject to the offset provision. Tr. 16.

> Plaintiff also asserts that the ALJ erred in stating that
>
> [t]he USPS is similar to numerous other independent agencies; these include the Social Security Administration, the Pension Benefit Guaranty Corporation, the FDIC, the Federal Trade Commission, the SEC, the Small Business Administration, and myriad other alphabet agencies which undertake important government operations.

Plaintiff's Response to Answer at 2:8-15; see also Tr. 15. Plaintiff contends that the independent agencies listed by the ALJ are not similar to the USPS because they do not "generate their own income or pay their own operational costs to include all employment and retirement costs," because they do not "compete directly

with private enterprises," and because they do not sponsor any Tour de France cycling teams. Plaintiff's Response to Answer at 3:4-15. The ALJ, however, did not state that the USPS is similar to the other identified agencies in every aspect. Rather, the ALJ found the USPS to be similar to those agencies in the aspect which is relevant here: its status as "an independent establishment of the executive branch." Tr. 15. Moreover, plaintiff's statements fail to show that the USPS is not "an independent establishment of the executive branch" and that plaintiff's pension from the USPS is not a federal government pension. Plaintiff's widow's benefits are thus still subject to the offset provision.

Furthermore, plaintiff argues that Heckler v.

Matthews does not apply to her case because it is "outdated . . . due to the fact that the current non-budgetary status was not raised or addressed at that juncture." Plaintiff's Response 3:6-9. In Heckler v. Matthews, supra, plaintiff, a retired USPS worker, applied for husband's benefits on his wife's SSA account. 465 U.S. at 734-735. The SSA informed the plaintiff that his husband's benefits would be offset by his monthly USPS pension in accordance with 42 U.S.C. section 402. Id. At 735. The plaintiff appealed the offset based on asserted due process violations not relevant to this appeal. Id. Nevertheless, there appeared, however, to be no dispute in Heckler that USPS pensions fell under the category of government pensions covered by the 42 U.S.C. section 402(b)(4)(A)

and (c)(2)(A) offset provision. See id. The court agrees with plaintiff that Heckler is not dispositive here because the questions of whether the USPS is governed by the offset rule was never specifically addressed in that case. However, plaintiff has failed to present any authority indicating that the USPS is *not* covered by the offset provision and, in the absence of any such authority, the apparent lack of any dispute on that question in Heckler provides at least some guidance.

Lastly, plaintiff has cited no authority indicating that what she asserts is USPS' "off budget" status would exempt the USPS from the offset provision in 42 U.S.C. section 402(e)(7)(A) and 20 C.F.R. section 404.408a(a), or which indicates that the USPS is not part of the federal government. In Silver v. U.S. Postal Serv., 951

F.2d 1033, 1035 (9th Cir. 1991), the plaintiff argued that the USPS is not part of the executive branch of the federal government, and thus does not have the authority to enforce federal law. Id. at 1035. The Ninth Circuit disagreed with the plaintiff, holding that

> the mere fact the [USPS] is not designated a department or government corporation, however, does not mean it is not a part of the executive branch. When Congress created the [USPS], it made the [USPS] 'an independent establishment of the executive branch of the Government of the United States.' 39 U.S.C. § 201 . . . . . Congress could not have made its intent more clear that the [USPS] was to remain a part of the U.S. Government and to perform executive branch functions within that government . . . .
>
> No Court has ever held the {USPS} not to be

part of the executive branch. Id. at 1035-1036. The Ninth Circuit also noted that USPS employees are part

of the civil service, subject to the same security and conduct standards as all federal employees, and that the USPS still submits an annual budget to the Office of Management and Budget. Id. At 1036 (citing 39 U.S.C. 100(b); 39 U.S.C. § 410(b)(l), §2009). Therefore, the court finds that the ALJ properly concluded that "there is little dispute about the fact that the USPS continues to function as an integral part of the U.S. government," and that plaintiff's widow's benefits are subject to the offset pursuant to 42 U.S.C. section 402(e)(7)(A) and 20 C.F.R. section 404.408a(a). Tr. 15.

IV. ORDER

For the reasons set forth above, the court grants defendant's cross-motion for summary judgment and denies plaintiff's motion for summary judgment.

DATED: 8/21/01

/s/
RONALD M. WHYTE
United States District Judge

Copy of order mailed on SEP 4 2001 to:

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN S. ZELMER, Plaintiff-Appellant, v. JO ANNE BARNHART, *Commissioner of the Social Security Admin. Defendant-Appellee.	NO. 01-16974 D.C. No. CV-00-20554-RMW MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted September 9, 2002***

Before: HUG, O'SCANNLAIN, and TASHIMA, Circuit Judges

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* Jo Anne B. Barnhart is substituted for her predecessor as Commissioner of the Social Security Administration, pursuant to Fed. R. App. P. 43 (c)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Karen S. Zelmer appeals pro se the district court's summary judgment for the Commissioner of the Social Security Administration ("Commissioner") affirming the decision to deny her application for widow's disability benefits pursuant to Title II of the Social Security Act, 42 U.S.C. § 402. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's order and will uphold the Commissioner's decision if it is supported by

substantial evidence and free of legal error. *Pagter v. Massanari*, 250 F. 3d 1255, 1258 (9th Cir. 2001). We affirm.

Zelmer contends the Administrative Law Judge ("ALJ") erred by reducing her widow's insurance benefits in light of her retirement benefits from the United States Postal Service ("USPS"), because the USPS is not part of the federal government. *See* 42 U.S.C. § 401(e)(7)(A). Contrary to to Zelmer's contention, the USPS is a part of the federal government. *See Silver v. USPS*, 951 F.2d 1033, 1035-36 (9th Cir. 1991) (per curiam) (stating that the USPS is a part of the executive branch and that USPS employees are part of the civil service). Accordingly, the Commissioner properly offset Zelmer's widow's insurance benefits. *See Heckler v. Matthews,* 465 U.S. 728, 748-50 (1984).

Furthermore, the ALJ properly denied Zelmer's request for a change of venue because Zelmer failed to produce evidence that her representative was unable to travel or that any other basis for good cause existed. *See* 20 C.F.R. § 404.936(b) (permitting the ALJ to change the place where a hearing is held upon a showing of good cause).

Zelmer's remaining contentions lack merit.

AFFIRMED.